**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**INCOME TAX REFERENCE NO. 3 OF 1991.**

The Commissioner of Income-tax,
Bombay City-III, BOmbay. ..Applicant

V/s.

M/s Aesthetic Builders Pvt.Ltd .. Respondent.

Shri Ashok Kotangale for the applicant.

Ms. Shobha Jagtiani with Prashant Uchol i/b D.M. Harish for the respondent.

**CORAM : V.C.DAGA AND A.S.AGUIAR, JJ.**

**DATED : 7-10-2005.**

**JUDGMENT : (Per V.C.Daga, J.)**
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1. This is a reference to this Court for opinion under section 256(1) of the Income-tax Act, 1961 ('the Act' for short), at the instance of the Revenue arising out of the order of the Tribunal dated 10th August 1988 in relation to the Assessment Year 1980-81. The question referred is as under:

> " Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that interest u/s 217 was not leviable for failure to revise the statement of income u/s 209A(4), ignoring the clear provisions of sec. 209A(1) to the effect that statement of advance tax is required to be sent if the current income is likely to exceed Rs.2500/- in company cases, as per sec. 208(2)?"

**FACTS:**

. The essential facts found by the CIT (A) and ITAT are as under:

2. Assessment in the case of the respodent-assessee for the A.Y. 1978-79 was completed on total income of Rs.16,79,938/-, after 15th June 1979; i.e after the last date on which the assessee was required to file statement of its income exigible to advance tax in terms of the provision of section 209A for A.Y. 1979-80.

3. The assessee did not pay advance tax during the financial year 1979-80. However, the assessee chose to file Form No.28-A, showing a loss of Rs.2500/-. This was on the basis of the assessment made for A.Y. 1977-78 which had resulted into negative income.

4. The assessee filed return later on in the year 1979-80 showing positive income. The Income-tax Officer while giving effect to the appeallate order assessed the income at Rs. 13,71,369/- as against the income returned by the assessee on 30.6.1980 in the sum of Rs.10,29,090/-.

5. The Income-tax Officer while assessing the respondent-assessee passed the following order:

> . " Charge interest under section 215 as statement of advance-tax filed on 6.4.1979 has not been revised upward before the last date of payment of advance-tax."

6. The assessee made an application before the Income-tax Officer contending that levy of interest under section 215 is erroneous and prayed that the same should be vacated. However, said submission did not find favour with the Income-tax Officer. Consequently, application made by the respondent-assessee came to be rejected.

7. Appeal was filed against the aforesaid order before the C.I.T.(A). In appeal, it was urged that interest was not leviable under section 215 as such the order of the Income-tax Officer was wrong. It was further urged that such interest charged by the Income Tax Officer; if at all to be levied should have been considered with reference to provisions of section 217 and at any rate, on merits no interest was leviable at all either under sections 215 or 217.

8. It was reiterated by the assessee that as on 15th June, which was the relevant date for filing statement of advance-tax payable, the assessee was under no obligation to file an estimate/statement of advance tax since on that date the last completed assessment had resulted in a loss and no payment under section 140A had taken place between the last

completed assessment and the relevant date i.e. 15.6.1979 when the time for filing the statement and payment of first instalment of advance tax became due.

9. The respondent- assessee had also contended that since it was liable to pay advance tax under section 209A, as such the question of filing of revised estimate did not arise in case of the assessee, thus, no interest either under section 215 or 217 was leviable.

10. The C.I.T.(A) after appreciating the aforesaid submissions was pleased to hold as under:

> . "Levy of interest under section 217 is not in order and the Income-tax Officer has not applied his mind to the facts of the case properly and the levy was bad in law."

The C.I.T.(A) was, thus, pleased to allow the appeal filed by respondent-assessee vide its order dated 13.12.1984.

11. The Revenue, not satisfied with the aforesaid order filed an appeal before the I.T.A.T. The ITAT was pleased to record following concession

given by the parties to the appeal during the course of hearing:

" Before us, both the parties agreed that we should consider the case as levy of interest is under section 217 and not 215."

12. The parties reiterated their respective submissions which were advanced before the C.I.T.(A). The ITAT, after hearing parties, was pleased to rely on the CIT(A);s reasoning making it clear that the order directing cancellation of interest and reasons mentioned by the CIT(A) in support of its order were quite valid. The Tribunal while holding the appeal maintainable was pleased to affirm the order of the CIT(A), the first appellate authority.

13. The Revenue sought reference with respect to two questions of law; one relating to maintainability of the appeal and second relating to jurisdiction of the Tribunal holding that interest under section 217 was not leviable for failure to receive the statement of interest under sec. 209A(4).

14. The question of law extracted in the opening part of this judgment came to be referred as

substantial question of law; which in substance challenges the decision of the ITAT on the ground that the Tribunal has ignored the clear provisions of section 209A(1) to the effect that statement of advance tax is required to be sent; if the current income is likely to exceed Rs.2500/- in Company's case as per section 208(2). (as it stood at the relevant time)

**Submissions:**

15. The learned Counsel appearing for the Revenue submitted that as held by the Income-tax Officer even if statement of advance tax payable was computed in the sum of Rs.2500/- the obligation to file such statement remained and in the circumstances, the assessee having failed to do so, interest was rightly levied by the Income-tax Officer. It was however, under section 217 and not 215. It was further submitted by the Counsel for the Revenue that for the purposes of applicability of section 209A of the Act, once it is shown that the total income of the assessee had exceeded the amount specified in sub-section (2) of section 208, the obligation to submit a statement was absolute and levy of interest was a natural consequence.

16. The Counsel for Revenue further submitted

that the Tribunal had committed an error of law in confirming the order of the C.I.T.(A); who, had erroneously taken into account the last assessment in this case which was completed before first instalment was due for the A.Y. 1977-78 and which was resulted in loss. According to him, the C.I.T. (A) has wrongly relied upon sub-clause (1) of section 209 to hold that no payment was required to be made for any previous assessment years under appeal including with respect to the subsequent assessment year 1977-78 before 15.6.1979 in case of the respondent-assessee. Thus, the question of assessee filing estimate of advance tax did not arise in the financial year . In the submission of the learned Counsel for the Revenue, the C.I.T.(A) has wrongly held that levy of interest under section 217 was erroneous.

17. Alternatively, learned Counsel appearing for the Revenue submits that the crux of the issue is : "What meaning is to be assigned to the words ".....where he has not been assessed by way of regular assessment under this Act."

18 The Counsel while recapitulating the submissions of the assessee, submits that according to the assessee, those words would mean the assessee who had never been assessed under the provisions of the Act. To put it differently, that person would fall in those words, who is absolutely fresh and new

assessee for the first time coming within the mischief of the Act and not that person who had been once assessed under the Act.

19. To counter this submission, learned Counsel for the Revenue submits that while interpreting the words referred to hereinabove, it cannot be understood to exclude the assessee, who had filed his return of income for previous assessment year but has not been assessed for that assessment year under the provisions of the Act.

20. Learned Counsel for the Revenue while elaborating logic behind this submission, submitted that if new or fresh assessee who has not been previously assessed by way of regular assessment under the Act is under an obligation to furnish estimate of his current income (if it exceeds the amount specified in sub-section (2) of section 208) and advance calculated by him on the current income in the manner laid down in section 209 and on the top of it if he is required to pay advance tax as contemplated under section 209A, then,as against this, how the assessee, who has filed his return of income for the previous year but has not been assessed, can be put to a more adventageous position than that of fresh assessee who has never been assessed under the Act. He, thus, submits that

irrespective of the absence of the assessment of his return for the previous assessment year, the respondent-assessee was under an obligation to comply with provisions of section 209A of the Act. In this view of the submission, he tried to justify the interest levied under section 217 of the Act.

**Per Contra:**

21. Mrs. Shobha Jagtiani, learned Counsel appearing for the respondent-assessee as against the aforesaid submission, submitted that the order of the Tribunal was justified considering the scheme of the provisions regarding computation of payment of tax. In support of her submissions, she placed reliance on the decision of this Court with two decisions of the Calcutta High Court.:

1. Patel Aluminium P.Ltd. vs. Tawadia (K.M.) (Miss), ITO. 165 ITR 99 (Bom)

2. CIT vs. Indian Molasses Co.P.Ltd (1993) 200 ITR 149 (Cal.)

3. Director of Income-tax (Exemption) vs Shree Sitaram Public Charitable Trust. (1994) 207 ITR 1087 (Cal.)

21-A. Ms. Jagtiani, learned Counsel for the assessee further submitted that there is no dispute that on 15th June, 1979 no statement was required to be filed by the assessee since there was no positive

income on the basis of the computation to be made under section 209A since last regular assessment was showing loss. No advance-tax was thus payable.

21-B. Ms. Jagtiani further submits that sub-section (1A) of section 217 provides for charging of interest where the assessee; who is required to send an estimate under sub-section (4) of section 209A has not sent such an estimate. According to her, Section 209A brings within its purview only the cases of those assessees who are liable to pay advance-tax under sub-section (1) and in such cases the assessees have to send a revised estimate if the current income to be estimated by the assessee exceeds the advance-tax payable by more than 33 1/3% If the advance tax payable is 'NIL' then no statement is required to be furnished, as such there can be no question of the current income likely to exceed by 3 1/3% of NIL or loss figure. In her submission, thus, it is clear that no advance-tax is payable by the assessee in the first instance by virtue of sections 209 and 209A.If the assesse is not required to send any statement, then there is no further obligation to file a revised estimate since no statement was required to be filed in the first case. According to Ms. Jagtiani, in the Bombay High Court decision in the case of Patel Aluminium Pvt. Ltd reported in 165 ITR 99 Justice

Bharucha while analysing the scheme of section 209A at page 103 of the judgment and has clearly laid down as follows:

> . "The question really boils down to an interpretation of the words "a statement of advance-tax payable by him computed in the manner laid down in" section 209(1)(a). Under section 209A (1)(a), the obligation of an assessee who has been previously regularly assessed to tax is to compute the advance-tax payable by him inthe manner provided by section 209(1)(a), to send a statement of such computation to the Income-tax Officer and to pay the amount so computed. The statement that the assessee is obliged to send statement of the computation of advance tax payable by him, such computation to be made as provided by section 209(1)(a). If upon such computation being made, no advance-tax is found to be payable, there is no "advance-tax payable". There being no "advance tax payable, there is no obligation to send to the Income-tax Officer a statement of such computation."

Based on the above observation of this Court, Ms. Jagtiani submits that the object of sending the statement is to make known to the Income-tax Officer, the computation upon which figure of advance has been arrived at.Where no advance-tax payment is to be made, there is no purpose in sending to the Income-tax Officer the statement of computation of income.

22. In the above view of the matter, Ms. Jagtiani submits that the petitioners were not obliged to send to the Income-tax Officer, and

therefore, there could be no liability to pay interest under section 217(1)(a) or penalty under section 217(1)(9) or under section 273. Ms. Jagtiani extending the same submission further submits that if no statement was liable to be sent and no advance tax was payable in the first instance, then, automatically there is no obligation to revise the estimate upwards stood ceased as that could only be done by the assessee, who has in the first instance paid advance-tax or is liable to pay advance-tax and liable to send a statement. In her submission, it is very clearly so held in the case of CIT vs. Indian Molasses Co. Pvt.Ltd. 200 ITR 149 (Cal.).

23 . Let us now turn to the case of Indian Molasses Co. Pvt.Ltd (cited supra). The facts as occurred in that case are set out at page 151 of the Report in section G. In that case, the relevant assesment was for the year 1981-82 of which previous year ended on 30th June, 1980. The first instalment of advance-tax was due on 15.6.1980. The return for the proceeding assessment year 1980-81 was due on 30th June, 1980. Since the date 30th June, 1980 was after the date of the first instalment, neither the returned income for A.Y. 1980-81 nor the tax paid under section 140A for A.Y.1980-81 could be taken into account in considering the liability of

assessee to send a statement. It was Revenue's case that that the provisions of section 209A would be attracted to the facts of the case. However, the Calcutta High Court while dealing with the issues invoklved in the case has held as follows:

> . "Thus, sub-section (4) will only be attracted, if an assessee is liable to pay advance-tax under section (1), but, as we have already indicated in the instant case, on the basis of the facts prevailing in the financial year relevant to the assessment year of the assessee, the assessee had no obligation to furnish a statement of advance-tax under section 209A(a)(a) and as such sub-section (4) of section 209A cannot be pressed into service. That apart, the question referred to us does not cover the point raised by Mr. Bagchi. We have already set out the question which only deals with the obligation of the assessee to furnish a statement in terms of section 209A(1)(a)."

The above decision has been followed by the Calcutta High Court in Director of Income-tax (Exemption) vs. State Sitaram Public Charitable Trust 207 ITR 1087 and also referred to the Bombay High Court decision in Patel Aluminium Pvt.Ltd. 165 ITR 99. It was thus held by the Calcutta High Court in this decision that since the income in the last completed assessment under the latest income returned and assessed was nil, in such a case there was no liability to pay advance-tax on the part of the assessee as on 15th June. Therefore, there was no obligation to file a statement of advance-tax and

thus interest under section 217 was not payable. It has been held that "section 209A(1) incorporated a twin requirement namely filing of statement and paying of advance-tax in accordance with the statement.

24. Ms. Jagtiani reverting back to the facts of this case submitted that at the time when the assessee is obliged to file a statement under section 209A(1); what required to be looked into is whether assessee has any taxable income in the latest completed assessment. In such circumstances there was completed assessment, there was no question of levy of interest under section 217 of the Act. In this view of the submission, Ms. Jagtiani, learned Counsel for the respondent-assessee submits that the question set out in the opening part of this judgment be answered in the affirmative i.e. in favour of the assessee and against the Revenue.

25. Before dealing with the rival contentions it will be relevant to consider the scheme of Chapter VII regarding Advance tax payment. Briefly synopsis of the relevant sections is as under:

**STATUTORY PROVISIONS :**

**Order by Income-tax Officer:**

**Sec. 207(1):** This section states that tax shall be payable in advance in accordance with the provisions of sections 208 to 219, in respect of income which however excludes from purview income arising under the head Capital Gains and Income from House Property.

**Sec. 208(1):** This section states that advance-tax shall be payable during the financial year where total income ( excluding capital gails and income from house property) referred to in sub-clause (1) of clause (a) of section 209 exceeds the amount specified in sub-clause (2).The amount specified in sub-section (2) as applicable to Company is Rs. 2,500/-. This section provides that advance-tax shall be payable on the total income of the assessee is referred to in sub-clause (i) of clause (a) of section 209 which exceeds the limits laid down in Sub-section (2).

**Sec. 209(1):** This section provides for computation of advance-tax payable by an assessee and lays down the basis as being the total income of the latest previous year in respect of which the assessee has

been assessed by way of regular assessment and provides for certain deductions and exclusions therefrom. It is thus clear that section 208(A) refers to sub-clause (1) of clause (a) of section 209 which in turn refers to the total incomeof the latest previous year. The reference in section 208(i) is only to sub-clause (1) of Clause (a) of section 209. This section does however provide in sub-clause (iv) that it is the next amount of income-tax calculated on such income assessed by way of regular assessment payable but that however is subject to sub-clause (c) and (d) of section 209. Sub-clause (c) provides for the case where the estimate or revised statement has been sent by the assessee either under section 209A or section 212 then the income so estimated be substituted for the total income referred to clause (a). Sub-clause (d) provides that if the assessee has paid tax by way of self-assessment under section 140A for a year later than the previous year referred to clause (a) and such income exceeds total income referred to in clause (a) then this is to be substituted for the income referred to in (a) or as provided under sub-clause (2) if the income tax Officer makes an amendment order under section 210.

**Sec. 209A:** Section 209A provides that every person shall on or befiore the date when the first

instalment is due send to the Income-tax Officer, if he is an assessee who has previously been assessed by way of regular assessment, a statement of advance-tax payable by him which is to be computed in the manner laid down in clause (a), or as the case may be, sub-clause (1) of clause (d) of sub-section (1) of section 209. Since the assessee has been previously assessed by way of regular assessment, there is no dispute that such an assessee is to file a statement before the date on which the first instalment of advance-tax is due, i.e. by 15.6.1979, that he has to file a statement computed as laid down under clause (a) sub-clause (1) or clause (d) of sub-section (1).

. Sub-sectuib (2) of section 209A provides that an assessee who is required to send a statement under clause (a) of sub-section (1) estimates before first instalment is due that his current income is likely to be less than the income on which advance-tax is payable, then he can send an estimate in lieu of such statement and pay tax accordingly.

. Sub-section (3) further gives the option to the assessee to revise the estimate any time before the last instalment if the assessee estimates that his current income is likely to be less than the income on which advance-tax is payable.

. Sub-section (4) provides that in the case of an assessee who is liable to pay advance-tax under sub-section (1) or sub-section(2) or sub-section (3) and if the assessee estimates that the current income is likely to be greater than the amount on which advance-tax so payable has been computed than before the last instalemnt of advance-tax, the assessee has to send to the Income-tax Officer an estimate of the current income and the advance-tax payable by him to such advance-tax in accordance with the estimate and this revised estimate is to be sent if the difference between the current income estimated by the assessee exceeds the amount of advance-tax payable by more 33 1/3% of the latter amount.

210. Section 210 applies only to assessees who have been previously assessed by way of regular assessment. In the case of such assessees the Income-tax Officer can make an order in writing requiring the assessee to pay advance tax to be determined in accordance with the provisions of section 207,208 and 209 and the notice of demand accompanying his order has to specify the instalment in which the advance-tax is payable.

. Sub-section (3) provides that the Income-tax prior to 15 days from the date of last instalment taking into account the tax paid under section 140A or any later amendment order requiring the assessee to pay the advance-tax.

**Instalment of Advance-tax:**

211. This section provides that the advance-tax is payable in three instalments on 15th June, 15th September and 15th December.

**Estimate by assessee:**

212(1): This section refers to an assessee who has received an order under section 210 and estimates that the tax due in his case would be less than the amount that he is required to pay under such an order, then he has the option to send an estimate and pay tax in accordance with that estimate and sub-section (2) gives him option of a further estimate in such a case.

**Interest payable by assessee:**

215. Section 215(1) provides that if an assessee, who has paid advance-tax under section 209A or section 212 on the basis of his own estimate and if

the advance-tax so paid falls short of the criteria specified therein, then interest has to be paid by the assessee.

**Interest payable by assessee in case of under-estimate**:

216. This applies where the assessee has under-estimated the advance-tax either under section 212 or section 212, then in such cases interest is payable as specified in this section.

**Interest payableby assessee when no estimate is made:**

217(1): This interest is chargeable when the assessee being the person referred to in clause (a) of sub-section (1) has not sent statement referred to in that clause or the assessee referred to clause (b) has not sent the estimate, then in that case, interest at the rate of 12% per annum is chargeable in respect of the financial year in which the advance-tax was payable.

**CONSIDERATION:**

26. Having heard rival parties and having examined the statutory provisions and the cases

cited at the Bar, one thing is clear that section 217(1)(a) of the Act requires that where, on making the regular assessment, the Income Tax Officer finds that an assessee referred to clause (a) of sub-section (1) of section 209A has not sent the statement referred to in the said clause, simple interest at the prescribed rate for the specified period becomes payable by the assessee. Section 209A(1) (a) of the Act requires that in case of every person whose current income is likely to exceed the amount specified in section 208(2) of the Act, he shall file a statement of advance tax payable by him computed in the manner laid down in section 209(1)(a) of the Act, or section 209(1)(d)(i) of the Act, provided that such person has previously been assessed by way of regular assessment. Upon filing of such statement, such person is enjoined to pay such amount of advance tax as accords with such statement in equal instalment on the due dates specified in section 211 of the Act.

27. Turning to section 209 of the Act, it becomes clear that the mode of computation of advance tax is laid down by the said provision. For the present, it is necessary only to take into consideration section 209(1)(a)(i) read with section 209(1) (d)(i) of the Act. The said provision

stipulates that a person is liable to pay advance tax which is computed by adopting as the first base his total income of the latest previous year in respect of which he has been assessed by way of regular assessment and the second base would be the total income of the latest previous year by way of self assessment under section 140 of the Act. In otherwords, the purpose of computing the starting point of advance tax payable for a particular year, an assessee is required to adopt one of the two bases, namely, the one which is higher : either the total income assessed for the latest previous year by way of regular assessment, or the total income as shown in the return of income which is accompanied by self-assessment tax, and such return of income is relatable to the latest previous year as well as being later in point qua the year for which assessment is completed.

28. Applying the aforesaid scheme of the Act to the facts of the case, it is seen that the assessment for the assessment year 1977-78 was completed after 15th June, 1979 i.e. after date on which assessee was required to file statement of his income under the provisions of section 209A. The income of the assessee was a positive income for A.Y. 1977-78. The first instalment was due on 15th September, 1981. Therefore, the first terminus

ascertained as per the provisions of section 209(1)(a)(i) of the Act was assessed at loss. In so far as requirement of clause (d) of sub-section (1) of section 209 is concerned, it is an admitted position that, for all the subsequent years, the returned income was either "nil" or at a figure of loss. Thus, admittedly, in terms of section 209 (1)(d) of the Act, the total income for the previous year on the basis of self-assesment the advance tax could have been ascertained. In this circumstance, the respondent-assessee was obliged to file statement of advance tax as required under section 209. Requirement of submitting a statement or estimate under the provisions of the Act is for the purpose of paying advance tax and furnishing the basis to the assessing authority on which the advance tax is paid. Since there was a failure on the part of the assessee to file estimate of advance tax levy of interest under section 217 was justified. Having recorded finding in favour of the Revenue on this count, we feel, it is not necessary for us to consider alternate submission advanced by the learned Counsel for the Revenue.

29. Any requirement to pay interest is to be tested in the light of the commercial principles also. If a person liable to pay advance tax fails to pay, then its deprivation has to be compensated

in terms of money. Even on application of this commercial principle, the assessee has failed to make out any case for denying right of the revenue to claim interest.

30. In this view of the matter, the question is answered in the affirmative i.e. in favour of the Revenue and against the assessee.

**(V.C. DAGA, J.)**

**(A.S. AGUIAR,J.)**